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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION,
Petitioner

vs.

WALTER J. HICKEL, Secretary of Interior, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The New Mexico State Game Commission prays that a Writ of Certiorari issue to review the judgment of the

United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 15, 1969.[1]

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico, printed in Appendix B hereto, *infra*, p. A6, is reported in 281 F. Supp. 627. The opinion of the United States Court of Appeals for the Tenth Circuit, printed in Appendix B hereto, *infra*, A13, is reported in 410 F.2d 1197.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on May 15, 1969. Rehearing was denied on June 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

(1) Is this case properly one for a three-judge district court under 28 U.S.C. §2282?

(2) Do 16 U.S.C. §§1, 2-4 permit the Secretary of Interior and his agents to kill state-owned resident wildlife contrary to state law on federal land not exclusively owned by the United States for purposes of a scientific

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1. The case was originally brought in the United States District Court for the District of New Mexico against the Honorable Stewart L. Udall, Secretary of Interior; by order of the Court of Appeals entered on March 10, 1969, the Honorable Walter J. Hickel, Secretary of Interior, was substituted as a party in lieu of Mr. Udall.

Other parties respondent include: STANLEY A. CAIN, Assistant Secretary of the Interior; GEORGE HARTZOG, JR., Director of National Park Service; NEAL G. GUSE, Superintendent of Carlsbad Caverns National Park; R. R. MABERY, Chief Ranger; and ROBERT J. SCHUMERTH, NEAL R. BULLINGTON, WILLIAM J. WILSON, ROBERT M. TURNER, WALTER B. O'NEAL, WALTER H. KITTAM, DERRICK C. COOKE, Park Rangers.

study when there is no present or threatened depredation to the land.

(3) If 16 U.S.C. §§1, 2-4 do permit the Secretary to kill resident wildlife, do these statutes violate the Tenth Amendment to the United States Constitution?

STATUTES INVOLVED

The statutory provisions involved are Art. IV, Sec. 3, Cl. 2 and the Tenth Amendment of the United States Constitution; 39 Stat. 535, as amended, 16 U.S.C. §§1, 2-4; and N.M. Stat. Ann., §§ 53-2-7, 53-3-23, 53-3-25 (Repl. 1962). They are printed in Appendix A, *infra*, pp. A1 to A5.

STATEMENT

A complaint seeking declaratory and injunctive relief from allegedly illegal and unconstitutional actions of the Secretary of Interior and his agents [hereinafter "Secretary"] in killing deer owned by the State of New Mexico at Carlsbad Caverns National Park which is located in New Mexico was filed by the New Mexico State Game Commission [hereinafter "State"] on December 18, 1967. (R. 10-17). The jurisdiction of the District Court was invoked because the case arose under the Constitution and laws of the United States and the matter in actual controversy exceeded the sum or value of Ten Thousand Dollars ($10,000). 28 U.S.C. §§ 1331, 2201-02. Issue was joined by the filing of a stipulation between counsel concerning the facts and questions presented by the lawsuit. (R. 69-71).

The Complaint sought to enjoin the Secretary's killing of deer owned by the State of New Mexico on the *dual* grounds that no federal statute gave the Secretary authority for his actions *and* if a federal statute did give him the requisite authority, such was unconstitutional be-

cause it violated the Tenth Amendment to the United States Constitution.

The trial court was apprised of the constitutional questions but, because it believed that no federal statute permitted the Secretary to kill deer owned by the State of New Mexico at Carlsbad Caverns contrary to New Mexico law, decided that it need not convene a three-judge district court under 28 U.S.C. §§ 2282, 2284, to consider the substantial and unanswered constitutional questions presented by the Complaint, the State's Response to Defendants' Motion for Summary Judgment, and Stipulation. (Appendix B, *infra*, p. A6; R. 12, 63-64, 71). On April 1, 1968, in accordance with its findings of fact and conclusions of law set forth in its opinion, the trial court granted a declaratory judgment in favor of the State that the Secretary had no authority under any United States statute to kill deer at Carlsbad Caverns National Park in pursuing the study involved in this case. The trial court also permanently enjoined the Secretary and his agents from killing said deer without authority from the State of New Mexico. (Appendix B, *infra*, p. A13).

The United States Court of Appeals reversed the trial court on May 15, 1969, and held that the Secretary had authority under 16 U.S.C. §§ 1, 2-4, to kill State-owned deer at Carlsbad Caverns for research purposes. (Appendix B, *infra*, pp. A19 to A20). The State filed a "Petition for Remand to Three-Judge District Court and/or Petition for Rehearing" on May 29, 1969 (R., Court of Appeals 6), which was denied by the Tenth Circuit, without opinion, on June 13, 1969. (R., Court of Appeals 8).

An "Application for Three-Judge District Court Under 28 U.S.C. § 2282" was filed in the United States District Court for the District of New Mexico on July 7, 1969. This Application was denied on July 17, 1969, because the trial

court believed it no longer had jurisdiction to initiate the procedure for the convening of a three-judge district court. (Supplementary Record in District Court).

REASONS FOR GRANTING THE WRIT

I.

The Refusal of the Lower Courts to Convene a Three-Judge District Court Violates 28 U.S.C. § 2282 and Controlling Decisions of This Court.

Concurrently with the filing of this petition for certiorari, the State has filed in this Court a "Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus." Even though substantial grounds exist for this Court to consider the decision of the Court of Appeals on the merits, as can be more fully seen from the subsequent discussion in this petition for certiorari, the State urges this Court first to consider the petition for mandamus, which under 28 U.S.C. § 2282, and controlling decisions of this Court, will be dispositive of this case if the petition for a writ of mandamus is granted. If mandamus is granted, this Court need not consider this petition for certiorari; the argument under this point is made only in the exercise of conservative appellate practice to bring the issue of the necessity of a three-judge district court before this Court and seek a review of the fundamental procedural and jurisdictional question through an exercise of this Court's power of supervision of the lower federal courts.

The present controversy between the State and the Secretary presents substantial and unanswered constitutional questions about the authority of the Secretary to kill resident wildlife contrary to state law. The district court expressly said it would not consider the constitutional question because it found no statutory authorization in the Secretary to conduct the study involved in

this lawsuit. (Appendix B, *infra*, p. A8). It is difficult to determine whether the Court of Appeals thoroughly considered the constitutional questions raised by the State throughout this litigation. The opinion of the Court of Appeals states only:

> "Nor are there any constitutional barriers to the procedure. *Hunt* v. *Arizona, supra.*" [Appendix B, *infra*, p. A19.]

Even if the Court of Appeals did consider the constitutional questions involved in this case, it was without jurisdiction to do so, as the case is properly one for a three-judge district court. The Court of Appeals has refused to remand the case to the district court with an order to convene a three-judge district court (R., Court of Appeals 8); the district court has also refused to initiate the procedure for the convening of a three-judge district court. (Appendix B, *infra*, p. A8; R. 137-38; Supplementary Record in District Court).

28 U.S.C. § 2282 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Section 2282 is jurisdictional. See, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See also, *The Borden Company* v. *Liddy*, 309 F.2d 871 (8th Cir. 1962); *Marshall* v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962); *Riss & Co.* v. *Hoch*, 99 F.2d 553 (10th Cir. 1938). Where an injunction restraining the enforcement, operation or execution of an Act of Congress is sought on both constitutional and non-constitutional

grounds, a three-judge district court must be convened. *Flast* v. *Cohen*, 392 U.S. 83, 90, 88 S. Ct. 1942, 1947, 20 L. Ed. 2d 947 (1968); *Zemel* v. *Rusk*, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 80, 80 S. Ct. 568, 573, 4 L. Ed. 2d 568 (1960); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954); *Lee* v. *Bickell*, 292 U.S. 415, 51 S. Ct. 727, 78 L. Ed. 1337 (1934); *Sterling* v. *Constantin*, 287 U.S. 378, 53 S. Ct. 190, 77 L. Ed. 375 (1932).

Petitioner respectfully submits that both the Court of Appeals and the District Court erred in refusing to convene a three-judge district court. Because this case is properly cognizable only by a three-judge district court, both lower courts have been without jurisdiction. Such fundamental error can be cured by this Court's remanding the case to the lower courts with instructions to initiate the convening of the requisite three-judge tribunal.

II.

A Definition of the Limits of Federal Authority over State-Owned Resident Wildlife Is Required by the Federal Ownership of One-Third of the Land in the United States.

This suit was brought by the State to enjoin the Secretary from killing the deer in Carlsbad Caverns National Park pursuant to a scientific study and in contravention of state law. See N.M. Stat. Ann. § 53-2-7 (Repl. 1962). The study contemplated the killing of fifty (50) deer, fifteen (15) of which were actually killed before the Secretary was enjoined. Carlsbad Caverns National Park is situated within the boundaries of the State of New Mexico. Although the land is owned by the United States Government, New Mexico has never ceded exclusive jurisdiction over Park lands to the United States. The Park

is administered under the direction of the Secretary of Interior by the National Park Service. 46 Stat. 279, 16 U.S.C., § 407 (a). The narrow issue presented by the immediate facts of this case is the Secretary's authority to kill deer at Carlsbad Caverns National Park for a scientific study in contravention of New Mexico law. However, the determination of the narrow issue has implications and significance to the entire Nation which greatly transcend the facts of the present controversy.

The Court is respectfully requested to review this case because of the great national consequences inherent in the issues presented. Over one-third of the total area of the United States—that is, in excess of 760 million acres—is owned by the United States Government. U.S. Bureau of Census, *Statistical Abstract of the United States: 1968*, at 194 (89th Ed.). Major portions of many Western States are owned by the United States.[2] *Ibid.* Over 503 million acres of all lands owned by the United States are used by the Department of Interior and the Department of Agriculture for forest and wildlife purposes. *Id.*, at 196.

Even though the decision of the Court of Appeals concerns only the actions of the Secretary of Interior at Carlsbad Caverns National Park, the decision is substantial authority for both the Department of Agriculture and the Department of Interior to kill, without restriction, state-owned resident wildlife on any federal lands contrary to state law. (See 46 Stat. 1468, 7 U.S.C. § 426, concerning the authority of the Secretary of Agriculture to destroy injurious animals.) Since the greatest bulk of the land owned by the United States consists of lands used for forests and wild-

2. Alaska (96.9%); Arizona (44.8%); California (44.3%); Colorado (36.4%); Idaho (64.2%); Montana (29.7%); Nevada (86.4%); New Mexico (34.1%); Oregon (52.2%); Utah (66.6%); Washington (29.4%); and Wyoming (47.0%).

life, the decision reaches much further than fifty deer owned by the State of New Mexico. The decision reaches virtually every species of resident wildlife in the United States because most of such wildlife is indigenous to the forest.

The great concern of the several states with the issue in this case is evidenced by the number of Attorneys General who have deemed it necessary to join the State of New Mexico in petitioning this Court to review the decision of the United States Court of Appeals for the Tenth Circuit. Thirty-five states have joined with the State of New Mexico in this petition; one national and one international association dedicated to the conservation of wildlife have also joined with the State of New Mexico in its efforts to prohibit the Secretary's unwarranted invasion of the game management programs of the several states. (*Infra*, p. 23 *et seq.*)

Just as states are precluded from interfering with interstate commerce because uniform regulation thereof is necessary for its unfettered existence, so too should this Court prohibit the United States from interfering with the historical and traditional role of the states in game management. If the United States is permitted to manage game under the guise of a scientific study, the vast game management programs of the several states must necessarily fail because such programs obviously cannot be successful when one entity (United States) seeks to destroy the same species at the same time that another entity (several states) seeks to protect and preserve the same species. Yet, this is the situation present here—the Secretary seeks unlimited authority to destroy resident wildlife without complying with applicable state law. Thus, the significance of this case to all the states (especially to the Western States) arises from the many millions of acres owned

by the United States and makes this a most appropriate and important case for this Court to review if it is not to be remanded to a three-judge district court pursuant to the state's petition for mandamus concurrently filed herewith.

III.

The Court of Appeals Has Misconstrued This Court's Decision in Hunt v. United States.

The decision of the Court of Appeals can be summarized in four points:

1. Resident wildlife within a state is owned by the state.

2. The killing of New Mexico deer pursuant to the Secretary's study was within the Secretary's authority under 16 U.S.C. §§ 1, 2-4.

3. "Nor are there any constitutional barriers to the procedure. *Hunt* v. *Arizona, supra.*" (278 U.S. 96, 49 S. Ct. 38, 73 L. Ed. 200 (1928), *modifying,* 19 F.2d 634 (D. Ariz. 1927).)

4. Therefore, this suit was barred by the doctrine of sovereign immunity.

If the Secretary had authority under federal law to conduct the study and if it were within the power of Congress to authorize such a study, the holding of the Court of Appeals that this suit is barred by the doctrine of sovereign immunity is correct. If, however, the Secretary had no authority or if the Congress had no power under the Constitution to grant authority to the Secretary to destroy State-owned property for research purposes, the doctrine of sovereign immunity is not a bar to this suit. *E.g., Malone* v. *Bowdoin,* 369 U.S. 643, 82 S. Ct. 980, 8 L. Ed. 2d

168 (1962); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 702, 69 S. Ct. 1457, 1467, 93 L. Ed. 1628 (1949).

To determine whether federal law gave the Secretary authority for his study, whether such federal statutes are constitutional, and whether this suit is barred by the doctrine of sovereign immunity, one must begin with the long-standing doctrine that resident wildlife is owned by the states (*Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 57, 82 S. Ct. 552, 560, 7 L. Ed. 2d 562 (1962); *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549, 44 S. Ct. 186, 187, 68 L. Ed. 437 (1924); *Geer* v. *Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896)), and then determine the underlying purpose of the Secretary's study. If the purpose of the study were to prevent present depredation to federal lands, the State concedes that the Secretary had statutory authority to kill the deer involved in this case and such statutory authority is constitutional. *Hunt* v. *United States, supra.* The trial court found, however, that there was no present depredation to federal lands—a fact admitted by the Secretary in the trial court. (Appendix B, *infra*, p. A7).

Furthermore, even though no case so holds, it would seem to be a supportable conclusion that federal law permits the Secretary to kill resident wildlife upon a clear showing of an imminent threat of depredation to federal lands. Again, the State concedes that there would be no constitutional barriers to such a construction of 16 U.S.C. §§ 1, 2-4. Such a conclusion would not be a major departure from the holding of this Court in *Hunt* v. *United States, supra.* But, a reading of the trial court's decision in this case and the stipulation of facts (Appendix B, *infra*, p. A7; R. 69-71) reveals no evidence nor any finding of fact by the trial court that there was an imminent threat

of depredation to Carlsbad Caverns National Park. Finally, it is most important to note that nowhere in the record of this case has the Secretary contended that his study was necessary to prevent the threat of imminent depredation.

If there were no actual depredation and if there were no imminent threat of depredation to Carlsbad Caverns National Park, one could only conclude that the purpose of the study was for the collection of pure scientific information. A reading of the study supports this (R. 41, 43, 55); the stipulation of counsel supports this (R. 69-71); and the trial court so found:

> "The Court was informed that the Government did not intend to kill the deer because of a present knowledge of depredation, but merely to gather information as the basis for a study." [Appendix B, *infra*, p. A7.]

This finding of fact was not challenged by the Secretary in his appeal of this case to the Tenth Circuit; but even if the Secretary had contended that the scientific study were necessary to prevent even an imminent threat of depredation, a proposition which the record does not support, there was no showing by the Secretary that the killing of deer in contravention of New Mexico law was the only feasible method for acquiring such information.

Yet, a reading of the Tenth Circuit's decision in this case indicates that the Court of Appeals set aside the trial court's finding on the purpose of the study and supplied a finding of fact to bring the present case under the principles announced by this Court in *Hunt* v. *United States, supra*. The Court of Appeals, contrary to the finding of fact made by the trial court, indicates that the study was necessary "to obtain reliable scientific information necessary to conserve the scenery and wildlife in the Park." (Appendix B, *infra*, p. A15). Furthermore, the Court of Appeals said:

> "He [Secretary] need not wait until the damage through over-browsing has taken its toll on the Park plant life and deer herd before taking preventive action, no less than he would be required to delay the destruction of a vicious animal until after an attack upon a person." [Appendix B, *infra,* p. A18.]

It is axiomatic that a district court's findings of fact are not to be set aside on appeal unless "clearly erroneous." Rule 52 (a), Federal Rules of Civil Procedure. See also *Triangle Conduit & Cable Co., Inc.* v. *Federal Trade Commission*, 168 F.2d 175, 179 (7th Cir. 1948), *aff'd*, 336 U.S. 956, 69 S. Ct. 888, 93 L. Ed. 1110 (1949), where the Court said:

> "Findings of the trial court 'are to be construed liberally in support of a judgment or order. . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn.' "

And yet, the finding of Court of Appeals that there was a threat of depredation, a conclusion which is necessitated by its analogy to the destruction of a vicious animal, was made. That is, one would not know that an animal was vicious unless such animal had previously made some showing thereof. However, as pointed out above, there is no evidence in the record of this case that there was a threat of imminent depredation to federal lands, nor was such a contention made or such a finding requested, nor was there a showing that the information sought by the United States could not be obtained in ways other than the destruction of State-owned resident wildlife.

In finding that the Secretary had authority to kill the deer, the Court of Appeals analogized the present case to *Hunt* v. *United States, supra,* and also found that the United States Constitution did not preclude such authority in the Secretary. If a cursory look at the facts in *Hunt* is taken,

it is evident that *Hunt* is no authority for the Secretary's actions in this case.

In *Hunt*, the deer population at the Kaibab National Forest in a three-year period had increased from 3,000 to 30,000. Food for the deer was so insufficient that many were dying; those deer which survived were causing great injury to the federal land upon which they browsed. There was no question that the deer population had to be reduced. Various methods were attempted to reduce the population, such as trapping and shipping the deer to another site, but all such methods failed. The Secretary of Agriculture then authorized a hunt to reduce the deer population, but the Arizona officials objected, interfered therewith, and threatened to arrest and prosecute any violators of the very restrictive state game laws. See *Hunt* v. *United States*, 278 U.S. 96, 49 S. Ct. 38, 73 L. Ed. 200 (1928), *modifying*, 19 F.2d 634 (D. Ariz. 1927).

Facts in the present case are so substantially different from those in *Hunt* that it is no authority whatsoever for the actions of the Secretary of Interior here. There is no present depredation in this case nor is there any threatened depredation. No efforts to collect the scientific information desired by the United States have been made other than the killing of deer nor is it shown by the record that other methods for collecting the scientific information would be unfeasible. The State has not refused to cooperate with the United States but rather, the record clearly indicates that the State has offered the requisite scientific collection permits to the United States agents. (R. 70). State law is not restrictive like it was in Arizona but rather State law sets forth a procedure by which the scientific information desired can be collected. These, and other facts, reveal the great disparity between the facts of the present case and those of *Hunt*.

Yet, the Court of Appeals has said that *Hunt* is authority for the proposition that there are no constitutional barriers to permitting the Secretary, under 16 U.S.C. §§ 1, 2-4, to kill State-owned deer for purely scientific purposes.

The State of New Mexico respectfully submits that where there is no present depredation and no threat of depredation to federal lands, there are serious constitutional barriers which preclude the Secretary from killing state-owned deer in contravention of state law.

From the very beginning of this litigation the State has contended that, even if 16 U.S.C. §§ 1, 2-4 do give the Secretary authority to kill the deer in this case, such statutes are contrary to the Tenth Amendment to the United States Constitution. The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

No provision of the United States Constitution denies the power of game management to the states. The only power set forth in the United States Constitution which might permit the United States to kill resident wildlife, and the power relied upon by the Secretary in this case, is Article IV, § 3, Clause 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State."

The very language of the United States Constitution shows that the above constitutional provision is no authority for

the Secretary's actions. Under the above constitutional provision, Congress has been given the power only to make rules and regulations for property "belonging" to the United States. When Congress is promulgating legislation concerning land or property owned by the United States, it is true that it has virtually absolute power without limitations. Such absolute power extends over *lands* belonging to the United States; it does not, nor was it ever intended to, extend over resident species of *wildlife*. The above power does not extend over deer belonging to the State of New Mexico. Furthermore, it should be noted that this Court has said that Congress may deal with Federal property "precisely as an ordinary individual may deal with farming property." *Alabama* v. *Texas*, 347 U.S. 272, 273, 74 S. Ct. 481, 98 L. Ed. 689 (1954). Under New Mexico law, a private landowner would need a permit to kill deer under circumstances similar to those in this case. Unless there was depredation to the lands of the United States or a serious threat of depredation, the above power confers no authority because, under such circumstances, property of the United States is not involved. As explained above, the facts of this case clearly indicate that there was no present depredation nor threat of imminent depredation.

Furthermore, it is a long-standing principle of constitutional law that a state statute otherwise valid must be upheld unless there is found a very clear and actual conflict between the state and federal regulations so that they cannot stand in the same area, or unless there is found clear evidence of a Congressional design to preempt the field. *E.g., Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942). Section

53-3-25, New Mexico Statutes Annotated (Repl. 1962), provides that the State:

> "... may grant permits to owners or lessees of land for the capture or destruction on their lands of any protected game doing damage to their ... property. ..."

Furthermore, § 53-3-23, New Mexico Statutes Annotated (Repl. 1962), provides:

> "The state director may issue permits to any person to ... kill ... game ... at any time when satisfied that such person desires the same exclusively ... for scientific ... purposes."

Thus, New Mexico law provides a remedy where wildlife is damaging property and also provides a remedy where one desires to collect resident wildlife for scientific purposes. The permits under the above statutes were offered to the officials at Carlsbad Caverns National Park and were summarily refused by them. (R. 70). A comparison of the above statutes with 16 U.S.C. §§ 1, 2-4 shows no actual conflict; the tender of the permits emphasizes that there is no conflict; and the trial court so found. (Appendix B, *infra*, p. A12). Furthermore, the federal statutes exhibit no intent of Congress to preempt the field of game management—a field traditionally occupied in whole by the states because of their ownership of resident wildlife. Without the requisite conflict or attempt to preempt by Congress, the state statutes must be followed.

It is respectfully submitted that for the above reasons the Tenth Circuit has misconstrued this Court's decision in *Hunt* v. *United States* in permitting the Secretary's unauthorized and unconstitutional invasion of the time-honored field of game management by the several States. *Hunt* v. *United States* is no authority whatsoever for permitting the Secretary to kill resident wildlife for purely scientific reasons.

IV.

The Court of Appeals Erroneously Ignored Applicable Rules of Statutory Construction and Pertinent Legislative History.

In the course of the appeal of this case to the Tenth Circuit, the State and *amicus curiae* argued that numerous rules of statutory construction preclude the Secretary's contention for an unlimited interpretation of 16 U.S.C. §§ 1, 2-4. None of these rules was mentioned by the Court of Appeals in its decision in this case. (*Infra*, Appendix B, pp. A13 to A20). The most important of these rules of statutory construction is that the long-continued contemporaneous and practical interpretation of the statute by the executive officers charged with its administration and enforcement is an invaluable aid in determining the meaning of a doubtful statute. *E.g., Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L. Ed. 2d 616 (1965), and cases cited therein. The interpretation of the agency should prevail if it is reasonable and the language of the statute will support such a construction. Since 16 U.S.C. § 3 permits the Secretary to "provide in his discretion for the destruction of such animals . . . as may be detrimental to the use of any of said parks," and the question is whether there must be a showing of present depredation, threat of imminent depredation, or no showing of any kind necessary because of unlimited discretion in the Secretary, the interpretation placed on the statute throughout the years by the Department of Interior is highly pertinent to this case. As early as 1917 the Director of the National Park Service categorized the powers delegated under 16 U.S.C. §§ 1, 2-4, as follows:

> "The organic act then goes on to authorize the promulgation of rules and regulations for the use and management of the parks and monuments and prescribes the penalties that may be imposed for the vio-

> lation of such rules and regulations. Provision is made, too, for the leasing of park lands and the granting of permits for the use of these lands for the accommodation and entertainment of visitors. The *unusual conditions* under which timber may be cut, *under which animals may be killed,* plants destroyed, etc., and under which grazing of livestock may be permitted *are also included in the law.*" [Emphasis added.] [Annual Report of the Director of the National Park Service to the Secretary of the Interior for the Fiscal Year Ended June 30, 1917, p. 2.]

See also, 58 Dept. of Interior Opinions 331 (1943), where the Solicitor General for the Department of Interior said the following concerning regulation of hunting and fishing on Wind River Reservation in Wyoming:

> "There is no doubt, however, that the State can enforce its conservation laws on public lands. The Federal Government, to be sure, if necessary to protect its interests in such lands, may disregard State conservation laws, but in the absence of an overriding federal interest, they remain applicable."

The Solicitor also said:

> "Although it has been held that, under authority conferred by statute, federal administrative officers could proceed to exterminate deer committing depredations in a national forest despite inhibitions of State conversation laws, it is implicit in this decision that the State conservation laws would normally have governed (*Hunt* v. *United States,* 278 U.S. 96)."

See also, 36 Ops. Atty. Gen'l 527 (1932); S. Rep. No. 380, 88th Cong., 1st Sess. 7 (1963). The record in this case contains uncontradicted evidence that federal officers, prior to the action which precipitated this lawsuit, had on numerous occasions sought the requisite collection permits from the State of New Mexico in pursuing their scientific studies. (R. 73-85). In fact, as mentioned above,

permits were offered to the Secretary's agents for the purpose of conducting the study upon which this lawsuit is based. (R. 70).

Since a long line of case law makes it clear that the several states own resident wildlife (*supra*, at 10-11) two other important rules of statutory construction require that 16 U.S.C. §§ 1, 2-4 be construed strictly. Because the statute is relied upon by the Secretary to interfere with established or traditional property rights, the statute should be construed strictly. See *Interstate Commerce Commission* v. *Northern P. Ry. Co.*, 216 U.S. 538, 30 S. Ct. 417, 54 L. Ed. 608 (1910). Furthermore, the statute is in derogation of the common law and should be strictly construed as to the conditions upon which the United States can kill resident wildlife owned by the several states. 3 Sutherland, *Statutory Construction*, § 6201, at 164-66 (3rd Ed. 1943).

Also pertinent to an interpretation of the statute involved in this case is the rule that, absent an indication to the contrary, it may be presumed that Congress was aware of the numerous court decisions setting forth the states' ownership of resident species of wildlife and acted with such decisions in mind. See *Lynch* v. *Overholser*, 369 U.S. 705, 710-11, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962); *Shapiro* v. *United States*, 335 U.S. 1, 16, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948). Congress has abided by these numerous court decisions in other legislation. For example, in 48 Stat. 402 as amended, 16 U.S.C. § 664, a part of the Fish and Wildlife Coordination Act, the Secretary of Interior is prohibited from adopting rules or regulations "inconsistent with the laws for the protection of fish and game of the States in which such area [under the Act] is situated. . . ." Furthermore, where courts are asked to hold that state regulation of private interests should yield to

regulation by the federal government in situations involving exercise by the state of historic powers over traditionally local matters, this Court has repeatedly held that federal law does not preempt state law unless there is a clear and manifest purpose of Congress exhibited. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146-47, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960); *San Diego Building Trades* v. *Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *California* v. *Zook*, 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1949).

Finally, a long-standing rule of statutory construction adopted by this Court is that statutes should be interpreted as fairly as possible, in such a way as to free the statute from not insubstantial constitutional doubts. *Lynch* v. *Overholser, supra*; *International Association of Machinists* v. *Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961). If the statute involved in this case is interpreted to permit the Secretary's actions only upon the showing of present depredation or imminent threat of depredation, the serious constitutional questions posed above by the broad interpretation giving the Secretary unlimited authority would be obviated.

Neither did the Court of Appeals consider the important and relevant legislative history of 16 U.S.C. §§ 1, 2-4. Efforts to establish a National Park Service began in the 62nd Congress, continued in the 63rd Congress and culminated in approval of Public Law 235 in the 64th Congress. In no place in three separate hearings, in Senate and House reports, or in the debate leading up to enactment of the National Park Service is there any suggestion that the broad authority now claimed by the Secretary was either sought by the Department of Interior or intended

to be granted by Congress.[3] Indeed, the relevant legislative history which does exist suggests that Congress considered the authority to destroy animals that may be detrimental to the use of the park as authority only to act in exceptional circumstances.

The House versions of the bill to establish a National Park Service (Nos. 434 and 8668, 64th Cong., 1st Sess. (1916)) contained very general regulatory authority over the parks *and game* for the Secretary of Interior. The substitute measure recommended by the House Committee (H.R. 15522) granted general regulatory authority over the use and management of the parks to the Secretary but deleted the general regulatory authority over game and added a section authorizing the destruction of such animals as may be detrimental to the parks. Both provisions were later enacted and remain unchanged to this day. Even though the reasons for the House Committee's action were not discussed, its separate treatment of the Secretary's authority over wildlife confirms that the use of authority is not part of the Secretary's general regulatory authority over the parks but is instead a special authority granted by Congress for exercise in special situations.

Petitioner respectfully submits that the rules of statutory construction and pertinent legislative history dictate that 16 U.S.C. §§ 1, 2-4, are no authority for the Secretary's actions at Carlsbad Caverns National Park. The failure of the Court of Appeals to consider such relevant contentions should be reviewed by this Court because of the significance

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3. See *Hearings on S. 3463 Before the Senate Committee on Public Lands*, 62nd Cong., 2nd Sess. (1912); S. Rep. No. 676, 62nd Cong., 2nd Sess. (1912); *Hearings on H. R. 104 Before the House Committee on Public Lands*, 63rd Cong., 2nd Sess. (1914); *Hearings on H. R. 434 and H. R. 8668 Before the House Committee on Public Lands*, 64th Cong., 1st Sess. (1916); H. Rep. No. 700, 64th Cong., 1st Sess. (1916); S. Rep. No. 662, 64th Cong., 1st Sess. (1916); 53 Cong. Rec. 10362-65, 12150-52, 12632, 13004-05 (1916).

of this case and the effect of a decision herein in all states containing a great amount of federal land.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted in this case.

Respectfully submitted,

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